STATE OF MICHIGAN

COURT OF APPEALS

VONDA R. EVANS,

Plaintiff/Counter Defendant-Appellant,

v

MARLON EVANS,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
November 22, 2005

No. 261591
Wayne Circuit Court
LC No. 03-338423-DM

Before: Jansen, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of divorce. We affirm.

Plaintiff first argues that the court erred when it awarded the parties joint physical custody with equal parenting time. We disagree. When reviewing child custody cases, this Court reviews findings of fact, including findings with respect to the best interests of the child factors, under the great weight of the evidence standard. MCL 722.28; *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). Questions of law are reviewed for clear legal error; a trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Vodvarka*, *supra* at 508. A trial court's findings on each of the factors should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004). The abuse of discretion standard applies to the trial court's discretionary rulings, including to whom the court grants custody. *Vodvarka*, *supra*.

Custody disputes are to be resolved in the child's best interests, according to the factors set forth in MCL 722.23. *Mason v Simmons*, 267 Mich App 188, 191; 704 NW2d 104 (2005). However, before a trial court determines the child's best interests, it must address the factual question regarding whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence. MCL 722.27(1)(c); *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *Mogle*, *supra*. The trial court must make a specific finding regarding the existence of a custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). If it fails to do so, this Court will remand for a finding

unless there is sufficient information in the record for this Court to make its own finding by de novo review. *Id*.

In this case, because a temporary custody order was in place, the trial court was required to make a finding regarding whether an established custodial environment existed. *Id*. The trial court failed to make a specific finding that an established custodial environment existed. Nonetheless, there is sufficient evidence in the record to show that an established custodial environment existed with both parents. The children lived with both parents in Detroit their entire lives until plaintiff left the marital home in October of 2003. Defendant remained in the marital home and plaintiff established a new home. Since the December 23, 2003, interim custody order, plaintiff and defendant shared equal physical custody of the children.

Plaintiff argues correctly that the court committed clear legal error when it failed to specify whether an established custodial environment existed with one or both parents before examining the best interests of the children factors. However, the error does not warrant reversal because the court did not order a change in custody. It made permanent the equal joint physical custody arrangement that had been operating since the initial interim custody order was issued. Thus, plaintiff did not establish, even by a preponderance of the evidence, that a custody change would be in the children's best interests, and the trial court's failure to make a finding on whether an established custodial environment existed was harmless.

Plaintiff next contends that the court abused its discretion when it awarded the parties equal joint custody. Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor, and the failure to do so is usually reversible error. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). In determining the best interests of the child, the court need not give equal weight to the statutory best interests factors. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The court also does not have to comment on every matter in evidence or declare acceptance or rejection of every proposition argued. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). A trial court's findings on each of the factors should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson*, *supra*.

In this case, the trial court considered and explicitly stated its findings and conclusions regarding each factor. The court found that the parties were equally favored with respect to factors a, b, c, d, e and f, and equally disfavored with respect to factor g. The court credited defendant with factor j and credited plaintiff with factor k. The court found that the children's best interests were served by awarding plaintiff and defendant joint legal and joint physical custody, with equal parenting time. On appeal, plaintiff asserts that she should be credited with factors a, b, c, f and g, and that defendant should not be credited with factor j.

With respect to factor a, the love, affection, and other emotional ties existing between the parties involved and the child, MCL 722.23(1)(a), plaintiff argues that the court could not deem the parties equal because defendant did not love his children enough to curtail his short temper, vulgar language, and domestic violence against plaintiff. She contends that because the children witnessed the abuse, it harmed the emotional ties with defendant. Defendant testified that he never hit plaintiff. Defendant also described activities he did with his children and his desire to have joint custody. The court acknowledged the extreme animus between the parties, but

determined that both parents love and care for the children. The court's finding was not against the great weight of the evidence.

With respect to factor b, the capacity and disposition of the parties to give the child love, affection and guidance and to continue the education and religion of the child, MCL 722.23(1)(b), plaintiff argues that because she was responsible for the children's academic progress and religious upbringing, she should be credited with this factor. The court found nothing on the record to indicate that defendant would discourage the children's religious upbringing, but found that defendant, "like most, not all, fathers do not engage in the same kind of act or intimate involvement in the child's education that a mother provides." The record indicates that the children did not attend church on weekends when they are with their father. However, defendant pays half of the private school tuition, provides tutors and school uniforms, and investigated schools for both children. He tried to enroll one child in a summer program, but was unable to because plaintiff would not cooperate. Although this is a close question because of defendant's lack of religious observation, the court's finding that the factor favored both parties equally was not against the great weight of the evidence.

Factor c is the capacity and disposition of the parties involved to provide the child with food, clothing and medical care. MCL 722.23(1)(c). Plaintiff argues that because the record is devoid of evidence regarding defendant's income, the court should not have found that he was financially capable of providing for the children. However, defendant's income tax returns from the years 2001 and 2002 were admitted into evidence, and defendant is a practicing attorney. Defendant testified that he bought the children clothing, paid their tuition and took them on vacation. Thus, although defendant's income is not apparent from the record, the court had sufficient basis to conclude that the parties were equally capable and disposed to provide materially for the children.

Factor f, "the moral fitness of the parties involved," MCL 722.23(1)(f), relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship." *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). Conduct relevant to this factor includes "verbal abuse, drinking problems, driving record, physical or sexual abuse and other illegal or offensive behavior." *Id*., n 6. Plaintiff argues that the court should have considered defendant's marijuana smoking and his refusal to take a court ordered drug test. Monica Conyers corroborated plaintiff's testimony about defendant's marijuana consumption. The court found that even if defendant did smoke marijuana, that was not enough for defendant to be morally unfit because nothing in the record indicated that the children were aware of any illegal drug activity. In addition, plaintiff admitted that she has a drinking problem. But, there was also significant evidence that defendant was physically and verbally abusive toward plaintiff throughout the marriage and such behavior was, at times, witnessed by the children. Although this factor could reasonably have favored plaintiff, we are constrained by the rigorous standard of review to conclude that the court's finding was not against the great weight of the evidence.

With regard to factor g, the mental and physical health of the parties, MCL 722.23(1)(g), the trial court found that neither party suffered from any significant health concerns, but both needed counseling. Nothing in the record indicated that either party suffers any physical problems. Plaintiff argues that the court should have determined that this factor favored her because of defendant's bizarre and erratic behavior toward his family and legal colleagues. Three Wayne County assistant prosecutors testified that defendant acted inappropriately in their office and in court. However, plaintiff admitted that she has a drinking problem and that she once passed out on the side of the road during a drive home after consuming alcohol. The finding that this factor disfavors both parties was not against the great weight of the evidence.

The trial court found factor h, the children's home, school, and community record, MCL 722.23(1)(h), favored both parties. Plaintiff asserts that since the split week custody arrangement began, the children's home, school and community records reveal that the children progressed better when they remained in her custody during the week. However, plaintiff failed to present evidence to show any decline while in defendant's custody. Thus, the record did not clearly preponderate against the court's finding.

With respect to factor j, "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents," MCL 722.23(1)(j), the trial court found defendant to be more willing to encourage a close and continuing relationship. The trial court's finding was based on plaintiff's decision to take the children out of the country during defendant's parenting time without proper permission and plaintiff's own testimony that she does not have discussions with defendant. Plaintiff argues that the parties should have been equally favored or disfavored with factor j because domestic violence affected defendant's ability to foster a good relationship between plaintiff and the children. However, plaintiff did not present evidence to substantiate that claim. The court's finding that this factor favored defendant is not against the great weight of the evidence. In sum, in light of the record evidence and our standard of review, we conclude that the trial court's custody decision did not constitute an abuse of decision and must be affirmed on appeal. See *Vodvarka, supra*.

Plaintiff next objects to the court's division of the marital property because the trial court failed to take defendant's fault in the breakdown of the marriage into account. We review the trial court's findings of fact for clear error and then determine "whether the dispositional ruling was fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). The trial court is obligated to divide the property on the basis of a number of equitable factors: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity," although the trial court may also consider other factors where appropriate. *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). However, the ultimate dispositional ruling is discretionary and will only be reversed if we are left with the firm conviction that it was inequitable. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *McNamara v Horner (After Rem)*, 255 Mich App 667, 670; 662 NW2d 436 (2003).

Here, the court determined that any fault did not "rise to the level such that the division should be other than 50% of the total to each party." Plaintiff contends that the record was replete with evidence that the divorce was defendant's fault and the property distribution should reflect defendant's fault. However, plaintiff never sought a disparate property settlement at trial. Plaintiff remained silent after the court ruled on the property division and asked the parties if there was anything regarding the property distribution that it may have overlooked. Plaintiff's silence in response to a direct question by the court signaled her acquiescence. The failure to ask the court to consider defendant's fault in the property distribution, constituted a waiver of this issue. A party may not obtain relief on appeal based upon an issue the resolution to which he or she acquiesced at trial. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001).

In any case, even if defendant were more at fault than plaintiff in the breakdown of the marriage, the property distribution was equitable. Bearing in mind other factors such as the 12 year duration of the marriage, both parties' contributions to the marital estate, both parties' good health and similar basic needs, both parties' significant earning ability, and both parties' adversarial behavior during the marriage, the court's decision to equally divide the marital property was equitable.

Finally, plaintiff argues that the property distribution was erroneous because the trial court failed to make required findings of fact with respect to the value of defendant's law practice. We disagree.

As a prelude to property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment. *Beaty v Beaty*, 167 Mich App 553, 556; 423 NW2d 262 (1988). In *Olson*, *supra* at 628 this Court stated, "There are numerous ways in which a trial court can make such a valuation, but the most important point is that the trial court is obligated to make such a valuation if the value is in dispute." Accordingly, a trial court clearly errs when it fails to place a value on a disputed piece of marital property. *Id*.

Here, neither party presented evidence regarding the value of defendant's law practice. Plaintiff never argued at trial that she should be awarded a share of defendant's law practice. Therefore, there is no indication on the record that value of the law practice was in dispute. In the absence of any dispute and in the face of plaintiff's failure to present any evidence that defendant's law practice had any value, the court's failure to assign it a value was not clearly erroneous.

Plaintiff argues that the court precluded her from presenting any testimony about the value of defendant's law practice because it bifurcated the trial with respect to property. However, this argument is unavailing because the court clearly stated on the second day of trial that the trial was bifurcated "as it relates to any question of child support, not as to property. Those are two different concepts." Thus, plaintiff had ample time to apprise the court that she planned to present expert testimony and to move for a continuance if a scheduling difficulty arose.

Plaintiff also claims that the court's "preoccupation" with time constraints and "the irritability expressed with any tactic which might have prolonged trial beyond the prolonged deadline," prevented her from presenting evidence about the value of the law practice. However, plaintiff never tried to present expert testimony and never moved to adjourn the trial to allow time to schedule an expert to testify about the value of the law practice. Plaintiff never objected to the court's scheduling demands and, after the court made the property disposition, plaintiff remained silent when the court asked if there was anything regarding the property distribution that it may have overlooked. Error requiring reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray